Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	
Cable Communications Policy Act of 1984 as	)	MB Docket No. 05-311
amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

COMMENTS

OF THE

UNITED STATES TELECOM ASSOCIATION

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February 13, 2006

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SUMMARY OF COMMENTS

This is a vital, and welcome, rulemaking proceeding; one in which the Commission has the opportunity to substantially improve conditions in our society and economy. The NPRM initiated a major Commission reassessment of the cable franchise process, which establishes the regulatory requirements for companies seeking to provide video programming services over wireline networks. It is clear that this franchise process is negatively impacting broadband competition and the deployment of broadband networks, and not just limiting competition in video markets. Therefore, the Commission has the opportunity and, indeed, the obligation under Section 706 of the Telecommunications Act of 1996 to use its authority under section 621 to remove barriers to entry for broadband entrants who plan to bring much needed video choice to consumers and, thereby, accelerate and expand their broadband deployments.

Video services are essential to broadband deployment. Video programming is a critical component of the broadband bundle for two reasons: (1) it increases the value to customers and it offers a substantial potential revenue stream for providers; and (2) it is currently a competitive differentiator that is available to some of the primary broadband competitors, but not others. Therefore, it is imperative that entrants and competitors in broadband markets be free to offer video services on their broadband networks.

The cable franchise process, as implemented today, is inconsistent with national broadband policy. The cable franchise process facing entrants today was designed to address cable operator conduct in the absence of competition; not to manage a national policy in favor of broadband investment and competition. Given the importance of video programming distribution to the Commission's primary policy goal—broadband deployment and competition—the Commission should seize the opportunity to follow its past precedent (e.g.,

Section 214 "blanket authorizations") by modifying and minimizing the Section 621 cable franchise process as applied to video entrants. In addition, the Commission should recognize, as it has in many other markets, that the competitively neutral course is not to apply burdensome incumbent-oriented regulation to entrants but, rather, to eliminate regulation where possible and rely on market-based competition instead of regulatory prescriptions.

In particular, the Commission should take five tangible yet reasonably discrete steps to give meaning to the Section 621(a) obligation not to unreasonably refuse to award an additional competitive franchise (then, as described below, the Commission should preempt inconsistent state and local action, notably "level playing field" statutes). The five steps for implementing the reasonableness requirement in Section 621 are:

1. *Eliminate build-out requirements for entrants, relying instead on market competition;*
2. *Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent;*
3. *Require franchise approval as a matter of course for local exchange carrier (LEC) use of facilities that are covered by pre-existing access to rights of way;*
4. *Establish minimum time periods and procedural limits on franchise application review; and*
5. *Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee.*

When the Commission implements Section 621 in this way, it will substantially reduce cable franchise barriers to entry and, thereby, promote the deployment of advanced telecommunications capabilities to all Americans. Each of these recommendations is briefly explained in the following paragraphs, and then developed more fully in the Comments.

1. Eliminate build-out requirements for entrants, relying instead on market competition. Build-out requirements are antithetical to market-based competition where consumers, acting through market processes, determine where and when firms in competitive markets deploy networks and offer services. The Commission consistently has removed build-out requirements for competitors in other markets, and it should do the same for wireline video competitors to incumbent cable systems, allowing entrants the freedom to deploy broadband video as business conditions dictate. In particular, just as the Section 201 mandate for "just and reasonable" rates is fulfilled by the operation of competitive markets, so too should the "reasonable period of time" in Section 621 be determined by market-based competition rather than regulatory prescription.

2. Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent. Section 621 states that a local franchise authority (LFA) shall not "unreasonably refuse to award a competitive franchise." Given that entrants do not pose the kinds of risks to consumers that LFAs feared with cable incumbents, it is not reasonable to burden entrants with the same restrictions imposed on incumbents, as the Commission has repeatedly concluded. In fact, it is *unreasonable* to refuse to award competitive franchises unless competitors meet substantially the same terms and conditions imposed on incumbents. The Commission should end this practice.

3 and 4. Require franchise approval as a matter of course for LECs' use of facilities that are covered by pre-existing access to rights of way, and establish minimum time periods and procedural limits on franchise application review. Competitors subject to Commission jurisdiction typically do not have to go through the same burdensome licensing procedures that were applied to incumbents. For example, competitive LECs (CLECs) file "blanket" authorizations rather than endure the time and expense of the traditional Section 214 applications process, and they obtain state-wide licenses with a minimum of time and effort. The Commission should these precedents and similarly minimize the time and expense involved in obtaining a competitive cable franchise by making approval a matter of course in the usual case, with short time periods for LFA review. This is particularly true for LEC entrants, as they typically have authorization to use public rights of way *before* applying for a cable franchise, thereby removing the primary justification for cable franchise regulation.

5. Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee. The Commission should also take this opportunity to address another significant problem facing cable system competitors, namely local franchise authority (LFA) demands for payments or discounted services and equipment over and above franchise fees. These demands amount to taxation; they deter entry and competition; and they are prohibited by the Communications Act. The Commission should, therefore, put an end to this behavior by adopting a clear rule that all forms of consideration required by LFAs count against the franchise fee cap unless they are specifically authorized in the Act.

The Commission should preempt inconsistent state and local statutes, regulations, rules, and practices, particularly "level playing field" laws. Finally, the Commission should ensure that its decisions are given full effect by preempting inconsistent state and local action. In particular, the Commission should preempt so-called level playing field statutes, which generally require LFAs to grant franchises to competitors on terms comparable to those imposed on the incumbent cable operators. By contrast, the Commission and the states have never required cable companies and CLECs to match all of the obligations imposed on the incumbent LECs (ILECs), so as to eliminate barriers to entry. In fact, state level playing field are facially inconsistent with the Communications Act because they intrinsically limit the ability of LFAs to award franchises, substituting state judgments for those established in the Communications Act (including the possibility that it may be reasonable to offer more favorable franchise terms to competitors). Moreover, level playing field statutes may also violate the First Amendment. Such state usurpation of federal authority and Constitutional guarantees cannot stand.

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Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	))))	MB Docket No. 05-311

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

This is a vital, and welcome, rulemaking proceeding; one in which the Commission has the opportunity to substantially improve conditions in our society and economy. The United States of America is in the early stages of a once-in-a-lifetime opportunity to build on technological innovation and dramatically improve our communications networks. Some have likened the development of the Internet to the invention of the printing press.[1] It remains to be seen whether this is an accurate analogy in terms of the ultimate impact on society, but it is clear that we have hardly begun to realize the full potential of advanced telecommunications capabilities. The United States Telecom Association (USTelecom)[2] is pleased to submit these comments on the Notice of Proposed Rulemaking in this docket[3] to recommend a package of decisions that the Commission can make to improve broadband markets and hasten our

[1] *E.g.*, Jeremy M. Norman, *From Gutenberg to the Internet: A Sourcebook on the History of Information Technology* (2005); Umberto Eco, "From Internet to Gutenberg" (lecture at The Italian Academy for Advanced Studies in America, November 12, 1996), http://www.hf.ntnu.no/anv/Finnbo/tekster/Eco/Internet.htm.

[2] USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* WC Docket, No. 05-311, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005).

development of these new capabilities. The Commission can and, indeed, is compelled by the public interest to act in this proceeding to bring us closer to that broadband future.

The Commission's decision to revisit Section 621 of the Communications Act now is particularly well timed. Section 621 establishes the regulatory franchise process that is applied to most companies seeking to provide video programming services over wireline networks. Whereas Section 621, to date, has impacted only video markets for the most part, now it is clear that the franchise process also is impacting broadband, and even traditional telecommunications markets. In light of these impacts, the Commission is right to exercise its responsibility for administration of the entire Communications Act by reviewing the application of Section 621 and establishing rules to ensure that it is implemented faithfully with statutory intent.

In particular, the Commission has the opportunity and, indeed, the obligation to use its authority under section 621 to remove barriers to entry for broadband entrants who plan to bring much needed video choice to consumers and, thereby, accelerate and expand their broadband deployments. Section 706 of the Telecommunications Act of 1996[4] states that "The Commission … shall encourage the deployment … of advanced telecommunications capability[5] … by utilizing … regulating methods that remove barriers to infrastructure investment." Similarly, President George W. Bush has established a goal of "universal, affordable access for broadband technology by the year 2007."[6] In this regard, Chairman Martin has stated that additional

[4] 47 U.S.C. § 157 nt (1996) (This provision of the 1996 Act was not codified as an amendment to the Communications Act).

[5] Advanced Telecommunications Capability is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology," which is congruent with the Commission's definition of "broadband." 47 U.S.C. § 157 nt (c)(1).

[6] The White House, *A New Generation of American Innovation* (April 2004) (http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf) at 11.

multichannel video competition would "stimulate broadband deployment."[7] It is these broadband networks that will allow video services to be offered to customers, in competition with the cable providers. These entrants plan to offer service to thousands of communities across the country in just the next few years. To achieve such scope of video choice, it is imperative that the Commission exercise its authority under Section 621 and remove cable franchise barriers to entry (e.g., build-out requirements, in-kind payments in addition to maximum franchise fees, lengthy application procedures, etc.).

USTelecom sets forth in these Comments a set of tangible and achievable decisions and rules the Commission can adopt to remove barriers to video entry and, consequently, to foster broadband deployment. In brief, the Commission should seize the opportunity to substantially promote national broadband policy by implementing Section 621. In particular, the Commission should adopt rules placing limits on unreasonable refusals to award franchises, and on the imposition of unreasonable terms when awarding franchises (which amounts to a denial of the reasonable franchise application that did not have those conditions). Then, the Commission should preempt inconsistent state and local action, including invalidating "level playing field" statutes and provisions. Should the Commission fail to remove regulatory obstacles to local exchange carrier (LEC) entry in video markets, however, the loss to consumers from artificially diminished competition will never be recovered. Just delaying full wireline video competition by a single year will cost the Nation's consumers $8.2 billion.[8] The additional harm to broadband consumers from delayed entry and reduced competition is incalculable.

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[7] Leslie Cauley, *FCC Chief Considers Forcing Cable TV Competition*, USA Today (Aug. 22, 2005).

[8] George S. Ford & Thomas M. Koutsky, *"In Delay There Is No Plenty": The Consumer Welfare Cost of Franchise Reform Delay*, Phoenix Center Policy Bulletin No. 13 (January 2006), http://www.phoenix-center.org/PolicyBulletin/PCPB13Final.pdf (*Phoenix Center Bulletin #13*).

I. THE COMMISSION CAN PROMOTE NATIONAL BROADBAND POLICY BY PROMPTLY REMOVING FRANCHISE BARRIERS TO ENTRY.

One of the steps, if not the most important step, the Commission can and should take to promote our national broadband policy is to follow statutory intent and sound principles of competition policy by removing barriers to entry in markets for the distribution of multichannel video programming. As set forth in the following sections, when the Commission reviews the record it will find that:

A. *Video services are essential to broadband deployment;*
B. *The cable franchise process, as implemented today, is inconsistent with national broadband policy;*
C. *The public interest and statutory directives compel the Commission to implement Section 621 so as to advance broadband deployment; and*
D. *Consumers will be best served by Commission action to reduce and eliminate cable franchise barriers to entry.*

Each of these is summarized briefly in the following paragraphs and, then explained in detail in the succeeding sections.

Video services are essential to broadband deployment. Increasingly, broadband growth is tied to bundled services. The "triple play," which refers to a package of voice, video, and data services, may be the leading development in communications markets today. This one-stop shopping market for advanced services appears to have become increasingly important to consumers. It is evident, in any case, that firms' perceived need to compete for triple play customers is the driving force for broadband investment. Video programming is a critical component of the broadband bundle for two reasons: (1) it increases the value to customers and it offers a substantial potential revenue stream for providers; and (2) it is currently a competitive differentiator that is available to some of the primary broadband competitors, but not others. Therefore, it is imperative that entrants and competitors in broadband markets are free to offer video services on their broadband networks.

The cable franchise process, as implemented today, is inconsistent with national broadband policy. The current cable franchise process, as applied today, was designed to address cable operator conduct in the absence of competition; and not to manage a national policy in favor of broadband investment and competition. Given the importance of video programming distribution to the Commission's primary policy goal—broadband deployment and competition—the Commission should seize the opportunity in this proceeding to follow its past precedent (e.g., Section 214 "blanket authorizations") by modifying and minimizing the Section 621 cable franchise process as applied to video entrants. The Commission should also recognize, as it has in many other markets, that competitive neutrality requires not the application of burdensome incumbent-oriented regulation to entrants but, rather, the elimination of most regulation for entrants and reliance on market-based competition over regulatory prescriptions.

The public interest and statutory directives compel the Commission to implement Section 621 so as to advance broadband deployment. Cable communications, covered under Title VI, are just as much the Commission's responsibility as are other forms of communications covered by the Communications Act. Therefore, the Commission is well within its responsibility, and arguably compelled by statutory mandate, to reevaluate the cable franchising process and remove regulation of entrants to the extent possible given the increasing importance of video competition to broadband deployment.

Consumers will be best served by Commission action to reduce and eliminate cable franchise barriers to entry. The Commission has consistently recognized that consumers are better served by market-based competition than through regulatory prescriptions. Accordingly, the Commission has focused on policies and rules that promote entry and facilitate market-based competition. It is time for the Commission to bring these policies to markets for the delivery of video programming, particularly as competition will benefit broadband consumers as well as video consumers.

A. Video Services Are Essential To Broadband Deployment.

Section 621, like the rest of Title VI, increasingly impacts our nation's broadband policies and not just the distribution of video programming, which requires the Commission to reassess its oversight of Section 621 in light of the overall polices of the Communications Act as a whole. Video programming is a critical component of the broadband bundle for two reasons: (1) it increases the value to customers and it offers a substantial potential revenue stream for providers; and (2) it is currently a competitive differentiator that is available to some of the primary broadband competitors, but not others. These reasons, and their increasing importance, are explained in this section.

Increasingly, broadband growth is tied to bundled services. The "triple play," which refers to a package of voice, video, and data services, may be the leading development in communications markets today. This one-stop shopping market for advanced services appears to have become increasingly important to consumers.[9] It is evident, in any case, that firms' perceived need to compete for triple play customers is the driving force for broadband investment. Therefore, it is imperative that entrants and competitors in broadband markets are free to add video and voice services on their new and existing broadband networks.

[9] Alan Breznick, *MSOs Gear Up for Big VoIP Rollouts*, Cable Digital News, Mar. 1, 2005, http://www.cabledatacomnews.com/mar05/mar05-4.html; Matt Richtel, *It's Not Enough to be Just a Phone Company*, NY Times, Feb. 19, 2004, at C1; Ben Hunt, *Improved Technology Means That The Race to Provide Customers With a Single Package of Voice, Video and Data Services is Heating Up*, Financial Times, Jan. 12, 2005, at 15.

Local exchange carriers (LECs) generally do not offer video services today and, consequently, they are seeking to add video to their broadband service bundles. There are two clear reasons why adding video facilitates such broadband deployment. First, video services add potential revenues[10] and therefore can result in a market structure that will support more facilities-based entry.[11] Video service revenues are an important part of consumers' communication spending. According to a Pew Internet & American Life Project survey, the average household spends $51 per month on multichannel video programming services—a significant portion of their total communications (voice, video, Internet, wireless) spending (which averages about $122 per month per household).[12] If an entrant cannot readily offer a service that serves that large percentage of the average household's communications "pocketbook", then its ability to build new fiber-rich infrastructure will be substantially curtailed.

Second, broadband entry is particularly likely where new technology permits owners of formerly "single use" networks, such as LECs to upgrade their networks into multi-service platforms that can simultaneously provide voice, data, and video services. This allows firms to leverage their assets to enter related markets by reducing entry costs, which can accelerate the pace and scale of deployment. Therefore, regulations that deny existing and neighboring

[10] More precisely, video services offer contributions to investment in the form of incremental revenue (from all sources) that exceeds the incremental cost (from all sources) of providing the additional services.

[11] G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Competition after Unbundling: Entry, Industry Structure and Convergence,* Phoenix Center Policy Paper No. 21, (http://www.phoenix-center.org/pcpp/PCPP21Final.pdf (July 2005) (*Phoenix Center Paper #21)*

[12] J.B. Horrigan, *Consumption of Information Goods and Services in the United States*, at 28 Pew Internet & American Life Project (2003), http://www.pewinternet.org/pdfs/PIP_Info_Consumption.pdf.

networks access to particular markets or otherwise limit the potential revenues to be gained from serving a market will curtail network construction.[13]

When broadband entrants add video to their service mix, they also reduce the risk to their investments, which promotes entry in at least two additional ways. Adding service offerings to the network increases the chance that customers will purchase at least one service from a network that passes their homes. Moreover, by offering multiple services, the provider faces less risk of being unable to recover its investment should customers cease to be interested in a particular service.

B. The Current Franchise Process Is Inconsistent with National Broadband Policy.

The current cable franchise process was designed to address cable operator conduct *in the absence* of competition, and not to manage a national policy in favor of broadband investment and competition. In this regard, it is reminiscent of local exchange carrier licensing prior to the Telecommunications Act of 1996, and the Section 214 authorization process for authorizing entry and deployment in markets for interstate telecommunications.[14] The Commission modified and minimized those telecommunications licensing processes for entrants to ensure that they did not serve as a barrier to entry while preserving any residual public interest benefits that are not better served by market-based competition.[15] To state it another way, the Commission recognized that the entrants did not pose the risks that licensing regulation was designed to

[13] *See, e.g.*, *Phoenix Center Paper #21*.

[14] 47 U.S.C. § 214.

[15] *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980), and subsequent decisions in that docket.

address, and that the costs of applying such regulation to entrants were greater than any possible benefits.

Given the importance of video programming distribution to the Commission's primary policy goal—broadband deployment and competition—the Commission should seize the opportunity in this proceeding to follow its past precedent by modifying and minimizing the Section 621 cable franchise process as applied to video entrants. In particular, wireline video entry by LECs does not pose the same risks as did incumbent cable operator operation in a franchise area. Similarly, the cable franchise process acts as a substantial barrier to entry and should be minimized, just as the telecommunications licensing processes were minimized for voice competitors, including the very cable operators that disingenuously argue for extending incumbent cable system regulation to entrants. Finally, the Commission should recognize, as it has in many other markets, that the competitively neutral course is not to apply burdensome incumbent-oriented regulation to entrants but, rather, to eliminate as much regulation of entrants as possible and to rely on market-based competition rather than regulatory prescriptions.

The current local franchising system has persisted without significant alteration as wireline competitive entry in video markets has struggled to emerge and become established. The inapplicability of this system to competitive entry should be obvious as it is utterly inconsistent with the overall thrust of Commission precedent over the past 25 years. The Commission has steadfastly promoted entry by reducing regulatory burdens for entrants in recognition of their different circumstances and the need to remove barriers to entry. During this time, wireline video competitors mostly sought to enter only a few markets at a time and, they typically have encountered local franchising proceedings still centered largely on local rights-of-way issues. Perhaps this helps explain why there has been no Commission action addressing the unreasonableness of applying local franchise regulation to competitors in the same manner as to incumbents.

As broadband providers deploy networks and seek to add video services in competition with cable operators, it becomes more urgent that the Commission define reasonable requirements for cable system entrants. In particular, LECs are dealing with rapid and widespread cable system deployment of voice services, which allows them to offer the elusive "triple play." LECs need to have the opportunity to respond with video programming of their own, and to do so rapidly and on a broad scale. Moreover, many of the new entrants already have deployed networks and they do not need permission to access rights of way. Nonetheless, many broadband entrants face the prospect of having to obtain tens, hundreds, or even thousands of authorizations, which imposes considerable delay, particularly given that each franchise typically takes a number of months, and many man-hours, to negotiate.

The local franchise process is particularly inappropriate given that broadband is intrinsically interstate, and the subject of a national policy imperative. Local franchising authorities are not well suited to promote the federal interests in large-scale broadband deployment because they act independently based on local concerns rather than a national perspective. Unless the Commission adopts clear federal standards under Section 621 to guide the process, local franchise authorities (LFAs) will have no choice but to continue to base their decisions on local concerns without regard to the impact their decisions may have outside of their jurisdictions.[16]

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[16] As the Commission has noted,

> The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. … This concern is exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community

Moreover, in the absence of federal standards, incumbent cable operators will continue to seek anticompetitive conditions in franchise agreements and contest entry every step of the way, even in litigation and state legislation.[17] Frustrated franchise applicants will have little recourse. Section 621(a)(1) allows rejected cable franchise applicants to seek review of local franchising decisions in either federal or state court.[18] Case-by-case litigation, however, is costly, slow, and inherently uncertain in its outcomes, which naturally vary among courts and fact patterns. In sum, the existing franchising system, unguided by national rules defining reasonableness, is a major barrier to video entry and, in turn, to our national broadband policy.

C. The Public Interest and Statutory Directives Compel the Commission to Implement Section 621 So As To Advance Broadband Deployment.

Cable communications, covered under Title VI, are just as much the Commission's responsibility as are other forms of communications covered by the Communications Act. As such, the Commission is charged indisputably with administering the section 621 franchise process and ensuring that the public interest and statutory mandates are being served. In this regard, the Commission was given clear direction in Section 706 of the Telecommunications Act of 1996 to promote broadband deployment using all of its powers. Therefore, the Commission is

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> basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies.

TCI Cablevision of Oakland County Inc., 12 FCC Rcd 21396, ¶ 106 (1997).

[17] *See, e.g.*, Comments of Telesat Cablevision, *Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600 (filed Mar. 1, 1990) at 15 (framework invites open-ended regulatory delays and unreasonable demands and plays into the hands of incumbent cable operators that "invariably resist overbuilds with profuse and expensive litigation").

[18] 47 U.S.C. § 541(a)(1).

well within its responsibility and, arguably, compelled by statutory mandate to reevaluate the cable franchising process and remove regulation of entrants to the extent possible given the increasing importance of video competition to broadband deployment.

The Commission tentatively concluded in the NPRM that it has authority to implement Section 621, stating that it "is charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621."[19] USTelecom agrees, and submits that the Commission should promptly exercise its authority to ensure that Section 621 is not applied by LFAs in a manner inconsistent with the overall policies and objectives of the Communications Act. Title VI establishes a national framework for traditional cable regulation, codifying restrictions adopted by the Commission prior to passage of the 1984 Cable Act. Those restrictions on local franchise authority were specifically affirmed by the Supreme Court.[20] When LFAs engage in cable franchising, therefore, they are applying this federal framework (despite the absence of federal standards).

Title VI of the Communications Act was adopted in the 1984 Cable Act, which also amended Section 2 of the Communications Act to grant the Commission explicit jurisdiction over "cable services"[21] Therefore, the broad grants of authority in Sections 4(i), 303(r), and 201(b) all apply to Section 621, and give the Commission the authority to adopt rules

[19] NPRM ¶ 15.

[20] *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968); *see also FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

[21] *See* 47 U.S.C. § 152(a) ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service").

implementing the section. The use of these sources of authority has been upheld by the Supreme Court, which has affirmed that the Commission may enact rules implementing the Cable Act.[22]

The Supreme Court explained the role of administrative agencies with respect to statutory interpretation and implementation in *Chevron v. Natural Resources Defense Council*.[23] In that case, the Supreme Court ruled that courts must defer to an agency interpretation of a statute within its administrative responsibility in the absence of clear statutory language ("no ambiguity"), or where the agency's construction is outside the bounds of reason.[24] The *Chevron* standard applies to Title VI, and where "[t]he Cable Act does not define the term . . . [courts] will uphold the agency's definition of that term if it is reasonable."[25] Notably, *Chevron* specifically left to agencies not only questions of substantive law, but also the choice of interpretive methodology.[26]

With respect to the specific language at issue, the Commission clearly has the authority to define an "unresonabl[e] refus[a]" under Section 621,[27] as the Commission has specifically been affirmed in its exercise of the authority to implement the 1984 Cable Act.[28] In fact, the Commission actually has issued orders in the past implementing and enforcing other aspects of

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[22] *See City of New York* v. *FCC*, 486 U.S. 57, 70 n.6 (1988. *Accord United Video* v. *FCC*, 890 F.2d 1173, 1183 & n.4 (D.C. Cir. 1989); *see also Mobile Communications Corp.* v. *FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding authority under §§ 151 & 154(i)); *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987).

[23] 467 U.S. 837 (1984).

[24] *Id.* at 842.

[25] *Nat'l Cable Television Ass'n, Inc.*, 33 F.3d at 71.

[26] *Id*. at 862-63.

[27] *See* 47 U.S.C. § 541(a)(1).

[28] *See City of Chicago* v. *FCC*, 199 F.3d 424, 428 (7th Cir. 2000); *Time Warner* v. *Doyle*, 66 F.3d 867, 877 (7th Cir. 1995).

Section 621 and overruling franchising authority decisions that violate Section 621.[29] Nor is the Commission's authority limited to outright refusals to award franchises; when LFAs grant franchises with unreasonable terms or conditions, this is tantamount to an unreasonable refusal to award a franchise.[30] Finally, the Commission is the federal agency with primary jurisdiction over national video and broadband policies, which means that the Commission naturally must have continuing authority to ensure that Section 621 is being applied faithfully by local franchise authorities (LFAs).

Now that video services are critical to broadband deployment, the Commission must reassess the Section 621(a) prohibition on unreasonable franchise denials to give full effect to all provisions of the Communications Act and ensure that our national broadband policy is not thwarted by anachronistic applications of cable franchising provisions. As mentioned above, Section 706(a) of the Act mandates that the Commission shall "encourage the deployment . . . of advanced telecommunications capability to all Americans."[31] This mandate extends to the deployment of video services over advanced networks as the legislative history makes clear that Congress wanted the Commission to encourage the deployment of video services under the Commission's Section 706 authority.[32]

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[29] *See, e.g.*, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396 (1997), recon. den., 13 FCC Rcd *16400*, ¶¶ 78, 106 (1998); *Entertainment Connections, Inc*., 13 FCC Rcd 14277, ¶¶ 61, 66 (1998).

[30] *See, e.g.*, *Tribune Co.* v. *FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998); *Mobile Communications Corp. of America* v. *FCC*, 77 F.3d 1399 (D.C. Cir. 1996).

[31] *See* 47 U.S.C. § 157(a) nt.

[32] Indeed, Congress explained that Section 706:

> is intended to establish a national policy framework designed to accelerate the rapidly the private sector deployment of advanced telecommunications. . . . The goal is to accelerate deployment of advanced capability that will enable subscribers in all parts of the

The Section 706 mandate must be seen, at a minimum, as a clear statement of how the Commission must interpret the Communications Act—where a provision of the Act requires elaboration, implementation, or explanation, the Commission "shall encourage the deployment" of broadband by removing "barriers to infrastructure investment." The D.C. Circuit found that the Commission has the authority to consider Section 706's goals when the Commissions balances other non-exclusive principles in the Act.[33] Likewise, the D.C. Circuit upheld the Commission's findings that the interests of Section 706 outweighed countervailing factors that were expressly enumerated in other sections of the Act.[34] The Commission therefore not only has the authority to interpret Section 621(a)(1), but also must do so in a manner that encourages broadband deployment.

The Commission already has recognized that the public interest, and the pro-competitive mandates of Section 706, require it to remove regulatory constraints in order to "give incumbent LECs incentives to deploy advanced facilities allowing them to roll out their own triple play of services as cable competitors roll out theirs."[35] This conclusion applies just as strongly to entry in video markets as it did for entry in data markets. Moreover, it is also consistent with the

> United States to send and receive information in all its forms – voice, data, graphics, and *video* - over a high-speed switched, interactive, broadband, transmission capability.

S. Rep. No. 104-23, at 50-51 (1995) (emphasis added).

[33] *USTA* 359 F.3d at 580, 583 (allowing FCC to include section 706 among the principles it weighed for purposes of applying § 251(d)(2) factors because those factors were not exclusive).

[34] *Id*. ("[T]he Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

[35] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 20,293, 20,298 ¶ 13 & n.45 (2004) ("*BellSouth Order*").

conclusions of investment analysts, who have recognized that the economic lynchpin for broadband fiber deployment is the ability to earn video revenues. Without that, LECs cannot justify the cost of full scale deployment.[36]

The simplest and most effective way in which the Commission can fulfill its responsibilities for administering Title VI and providing authoritative guidance regarding the title's requirements is through implementing rules and orders. The fact that a rulemaking is not specifically required by the Cable Act does not bar Commission action. Instead, the Commission's general rulemaking authority authorizes the agency to construe and implement provisions of the Act that do not expressly grant such authority.[37] The Commission has used this authority to interpret and implement provisions of the Communications Act, including proceedings not specifically required by statute.[38]

Nor should the Commission be deterred by the fact that LFAs rather than the Commission receive and rule on franchise applications pursuant to Section 621. The Commission's authority has been held by the Supreme Court to extend to statutory provisions that are to be applied by other bodies, such as state regulatory commissions.[39] Similarly, the fact

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See, *e.g.*, A. Kilshore, Yankee Group, *Will Video Drive New Revenue Growth for Telcos?*, May 2004, at 11; SBC, Verizon Challenge Cable at Supercomm, *Telecom A.M.*, June 7, 2005; Cynthia Webb, SBC Bets $6 Billion Against Cable, *Wash. Post*, June 23, 2004; Buckingham Research Group, *Network Wars: Exploring Fiber's Rewards, Risks, Myths & Competitive Implications*, Nov. 30, 2004, at 23.

[37] *See*, *e.g.*, *United Video* v. *FCC*, 890 F.2d 1173, 1183 & n.4 (D.C. Cir. 1989); *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987).

[38] *See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 98-82; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 93-215.

[39] *AT&T v. Iowa Utilities*, 525 U.S. 366, 378 (1999) (the Supreme Court confirmed that the FCC had the authority to interpret Section 252(d)(2)'s pricing standard for unbundled network

that appellate review lies with the courts instead of the Commission does not alter the Commission's clear authority to adopt implementing rules. Therefore, the Commission should adopt rules that LFAs must follow as they process Section 621 franchise applications.

D. Consumers will be Best Served by Commission Action to Reduce and Eliminate Franchise Barriers to Entry.

Throughout its history, the Commission has repeatedly emphasized consumer welfare over other values. Starting in the 1970s, the Commission has consistently recognized that consumers are better served by market-based competition than through regulatory prescriptions. Accordingly, the Commission has focused on policies and rules that promote entry and facilitate market-based competition. It is time for the Commission to bring these policies to markets for the delivery of video programming, particularly as competition will benefit broadband consumers as well as video consumers.

Consumers will benefit from increased broadband entry. In the face of LEC fiber deployment, cable providers have now begun to offer increased broadband speeds,[40] and have themselves begun to explore new "switched" technologies that appear to be similar to LECs' IPTV models that increase channel capacity and provide other features, including more high-definition TV and video-on-demand.[41] A survey by Bank of America reports that incumbent

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elements even though the Act charged state commissions with establishing rates for individual network elements and ensuring that such rates are "just and reasonable.").

[40] See, e.g., David DeKok, *Comcast boosts speed of basic cable-modem Internet service*, The Patriot-News, July 13, 2005; Ed Gubbins, *Cable Speeds Close In On Fi*OS, Telephony, July 11, 2005, at; Marguerite Reardon, *Broadband speed war emerges; Cable providers are increasing speeds as Verizon rolls out its fiber-to-the-home network*, CNET NEWS.com, July 1, 2005; Doug LeDuc, *Comcast increases broadband speed; As battle with Verizon nears for cable service, company plans change*, Fort Wayne News Sentinel, July 19, 2005, at 5.

[41] Peter Grant, *Cable Operators Rush Services To Keep Edge*, Wall St. J., July 21, 2005, at B1.

cable operators have responded to Verizon's deployment of its FiOS video service by cutting prices by 28-42% in those areas where FiOS video is available.[42]

Not only will broadband video entry promote faster and further broadband deployment, but the additional wireline video competition that it brings will also generate substantial benefits that are not realized with satellite-based competition alone. Incumbent cable system operators continue to control nearly 70% of the video distribution market on average, with the remainder going largely to the two major direct broadcast satellite providers, even though a variety of competitors have been attempting to win market share for well over a decade.[43] At the same time, prices for video services across the country have been *increasing* on average at a pace that far surpasses the rate of inflation even though prices for local telephone, long-distance service, wireless and broadband services have plummeted.

Indeed, even with the presence of two DBS competitors, cable operators have been steadily increasing their prices more than 300% as fast as the Consumer Price Index ("CPI").[44] There is one clear exception to this general rule of cable rate increases—where a cable incumbent faces competition from a wire-based video provider (not a DBS service, and not necessarily a competitor also offering broadband), its rates are approximately 15% lower than the same operator's rates elsewhere.[45] Where the cable incumbent faces competition with a

[42] *Phoenix Center Bulletin #13*

[43] Public Notice, *FCC Issues 12th Annual Report To Congress On Video Competition*, MB Docket No. 05-255, (Feb. 10, 2006) (reporting that as of June 2005, cable incumbents controlled 69.4% of the video distribution programming market).

[44] United States General Accountability Office (GAO), *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 20 (Oct. 2003) (*2003 GAO Report*) (available at http://frwebgate.access.gpo.gov). GAO reported that cable rates increased 40% over a five-year period compared with a 12% increase in the CPI.

[45] *2003 GAO Report* at 3, 10 (cited in S. 1349, 109th Cong., 1st Sess. § 2(3) (2005)).

broadband service provider offering video service, it appears that the cable operator goes even further, responding "by providing more and better services and by reducing rates and offering special deals."[46] In fact, customers see the benefits of wireline competition in the form of substantially greater price cuts (on average 300% greater) for video services from wireline competition than from satellite competition.[47]

Unfortunately, relatively few consumers see the benefits of the direct competition between wireline multichannel video operators outlined by GAO. Fewer than 2% of the nation's households have a choice in wireline video provider[48] and, chief among the reasons for this state of affairs are: build-out requirements that often make entry prohibitive and inefficient; the bureaucratic local franchising process, which subjects entrants to needless paperwork, delay, and rent-seeking behavior; and cable operator actions aimed at enforcing these barriers to entry.

II. THE COMMISSION SHOULD ADOPT RULES PLACING LIMITS ON UNREASONABLE REFUSALS TO AWARD FRANCHISES.

The single biggest obstacle to widespread competition in the video services market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service. In its first annual report on video competition in 1994, the

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[46] GAO, *Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241,at 12 (Feb. 2004) (finding that "the monthly rate for cable television service was 41% lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30% lower when compared with their matched markets"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606 ¶ 11 (2004).

[47] GAO, *Report to the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary: Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets,* GAO 05-257 (2005).

[48] *See, e.g., 2003 GAO Report*.

Commission recognized that "[t]he local franchise process is, perhaps, the most important policy-relevant barrier to competitive entry in local cable markets."[49] That remains true today, as Chairman Martin has explained: "[l]ocal franchising obligation requirements might impede [telcos'] ability to come in and provide a competitive alternative for video services. . . . It's critical and important for us to try to make sure that anyone else who wants to come in and provide an alternative video service has the opportunity to do that."[50] With the importance of video programming to broadband deployment, the Commission should take steps in this proceeding to reduce significantly the barriers to entry posed by the local franchise process.

In particular, the Commission should take five tangible yet reasonably discrete steps to give meaning to the Section 621(a) obligation not to unreasonably refuse to award an additional competitive franchise (then, as described below, the Commission should preempt inconsistent state and local action, notably "level playing field" statutes). The five steps for implementing the reasonableness requirement in Section 621 are:

1. *Eliminate build-out requirements for entrants, relying instead on market competition;*
2. *Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent;*
3. *Require franchise approval as a matter of course for LEC use of facilities that are covered by pre-existing access to rights of way;*
4. *Establish minimum time periods and procedural limits on franchise application review; and*
5. *Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee.*

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[49] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 9 FCC Rcd 7442, Appendix H at ¶ 43 (1994) ("First Video Competition Report").

[50] Doug Halonen, *Telcos Take Their Case to the Feds; State Regs Hinder Entry to Video-Services Market*, Television Week, June 13, 2005, at 4 (quoting Chairman Martin).

When the Commission implements Section 621 in this way, it will substantially reduce cable franchise barriers to entry and, thereby, promote the deployment of advanced telecommunications capabilities to all Americans.

A. The Commission Should Eliminate Build-Out Requirements For Entrants, Relying Instead On Market Competition.

Build-out requirements are antithetical to market-based competition: consumers, acting through market processes, should determine where and when firms in competitive markets deploy networks and offer services. This market-based competition will inexorably produce better results and serve consumers better than regulators can hope to achieve (through no fault of their own … markets simply work better). The Commission consistently has removed build-out requirements for competitors in other markets, and it should do the same for wireline video competitors to incumbent cable systems.

There is a clear statutory foundation for removing build-out requirements on competitors—Section 621 requires a franchise authority to afford a cable system "a reasonable period of time to become capable of providing cable service to all households in the franchise area."[51] Just as the Section 201 mandate for "just and reasonable" rates[52] is fulfilled by the operation of competitive markets, so too should the "reasonable period of time" in Section 621 be determined by market-based competition rather than regulatory prescription. Competitive wireline video entry should not be dictated by, and limited to, the geographic contours of current franchised cable networks, as such constraints inevitably will delay and deter broadband

[51] 47 U.S.C. § 541(a)(4)(A).

[52] 47 U.S.C. § 201(b).

deployment. Instead, new entrant network owners should be free to deploy broadband video wherever they have networks, and as business conditions dictate.

Cable system operators argue that it is only fair that competitors should have to offer service to all of the same areas where they operate, yet this obscures the basic fact that the very notion of imposing build-out requirements on competitors is virtually unheard of in our economy. This is not how a market economy operates, and there is no reason to think that a command-oriented economy will do better than market competition at bringing broadband to the American public. In fact, the very idea of applying ex ante build-out requirements to competitors is utterly inconsistent with the core principles of market economics.

Cable operator arguments for extending build-out requirements to LEC entrants are particularly disingenuous. Cable operators are not subject to build-out requirements when they offer telecommunications or other voice communications services in competition with LECs; why shouldn't LECs be afforded the same treatment when they seek to compete with cable companies? In fact, cable operators seldom build out their own video networks to the same extent as LECs build out telecommunications networks (how many cable systems serve homes at densities of less than one or two homes per square mile?). If cable operators are so convinced that build-out requirements are a good idea, perhaps they should offer to build out and provide voice communications services across entire LEC study areas as a condition of their entry in markets for telecommunications and other voice services.

1. Build-Out Requirements Deter Competitive Entry

In response to the Commission's Notice of Inquiry for the 2005 Report to Congress, USTelecom provided the Commission with a clear illustration of how build-out requirements inhibit entry, using the experience of Lakedale Communications, a small LEC in Minnesota with

11,000 lines. Seeing an opportunity to enter additional markets and deploy broadband facilities, Lakedale joined with the Wright-Hennepin Cooperative Electric Association in 1999 to form WH LINK LLC, to build a system capable of providing video services as well as broadband Internet and voice services to portions of Otsego.[53] On March 25, 2002 Otsego initiated its statutory franchise application process and both WH LINK and the cable incumbent, Charter Communications, which had been operating under an extension permit, applied for franchises. Charter proposed to serve all areas of Otsego with a density of nine homes or more per quarter mile, and WH LINK proposed to serve a smaller area—five residential subdivisions where it was already providing telephone and Internet service—and to expand its network in the future if the system was successful.

Otsego approved Charter's franchise with a seven-year build-out requirement for all areas with a density of nine homes or more per quarter mile. The City approved WH LINK's application conditionally, as well, subject to its acceptance of the same build-out requirement, which it stated was required by Minnesota's "level playing field" statute. WH LINK rejected this requirement as impractical, but its appeal was denied.[54] Consequently, WH LINK did not enter the market and Charter faces no wireline video competition in Otsego. Thus, the "level playing field" statute so assiduously defended by the incumbent cable industry has not helped customers but, rather, it has deprived many Otsego citizens of the benefits of video competition.

Another revealing example comes from Shenandoah Telecommunications Company ("Shentel"), which currently provides telephone service to Shenandoah County and a small

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[53] The facts of Lakedale's experience in Otsego are set forth in the opinion of the Minnesota Circuit Court of Appeals. *WH LINK, LLC v. City of Otsego*, 664 N.W. 2d 390 (Minn. Ct. App. 2003).

[54] *Id*.

portion of Rockingham County, Virginia. Within Rockingham County, Shentel serves approximately 450 residential customers (primarily in and around Bergton, VA). Through its cable subsidiary, Shentel currently holds a franchise to provide cable service within Shenandoah County (and it does provide such service), but it does not have a franchise to provide cable service within Rockingham County.

Shentel has upgraded its telephone network so as to have the capability to provide broadband internet service (using DSL) to all of its customers, including those living in Rockingham County, and Shentel has been investigating ways to provide video programming to its customers using this broadband network. However, without a franchise from Rockingham County, Shentel will not be able to offer cable video service to any of the (approximately 450) residential telephone customers living in Rockingham County. Shentel understands that it cannot obtain such a franchise without committing to provide service to the rest of Rockingham County as well, which is not economically feasible.

Not only is Shentel unable, therefore, to offer video programming to the approximately 450 customers on its network that happen to live in Rockingham County, but it appears that those customers may not be able to receive cable service from the incumbent cable operator either. It is Shentel's understanding that most (if not all) of these approximately 450 customers are not currently served by the current franchised cable operator in Rockingham County (Adelphia), and that the cable operator is under no obligation to become capable of providing service to those customers because the household density in that area falls below the build-out requirement threshold. Therefore, not only do irrational build-out requirements prevent these customers from receiving video programming services from Shentel, but the same regulations also fail to provide those customers with cable service from any other provider as well.

Other examples abound. For example, SureWest Communications, based in Roseville, California, has worked long and hard to deploy video to its customers since 2002,[55] and video was an integral part of its broadband deployment plans. SureWest is providing video programming today using Internet Protocol Television (IPTV), which it started to use commercially in 2004.[56] Unfortunately for consumers, SureWest was unable to pursue franchises in certain adjacent areas because of burdensome and uneconomical build-out requirements, while its cable company competitors do not face similar restrictions when deciding to add voice services in competition with SureWest. Similarly, BellSouth and Qwest, among others, have detailed situations in various filings where they were unable to enter markets because of build-out requirements.[57] Other overbuilders, such as Knology and RCN were also forced to scale back their network deployments as they struggled to comply with build-out requirements.[58]

[55] SureWest Communications, Presentation at 3rd Annual Jefferies Communications and Media Conference Webcast, at 7 (Sep. 20, 2005) (available at http://www.surw.com/ir/analyst/jcmc092005/?page=7).

[56] *Id.* at 6 (available at http://www.surw.com/ir/analyst/jcmc092005/?page=6).

[57] *See* BellSouth Comments, at 5-7, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (filed Sept. 19, 2005) (overbuild requirements in Germantown, TN, and Coral Springs, FL, forced BellSouth to withdraw franchise applications there); *id.*, Qwest Comments at 11 n.21, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (build-out conditions forced WideOpenWest to abandon its franchise agreements before acquiring a single subscriber).

[58] *See, e.g.*, Joe Estrella, *Overbuilders Pull Back in Four States*, Multichannel News, July 30, 2001, at 1.

2. The Communications Act Does *Not* Require Video Entrants To Build-Out Their Network Or Serve All Households In The Area

As the Commission evaluates build-out requirements, it is important to recognize that nothing in the Communications Act requires cable systems to build-out their networks to serve all households in a franchise area. In fact, few cable systems are capable of serving *all* households in the franchise area. Instead, most build out to a certain minimum density of households per square mile. Moreover, competitive entrants have been granted franchises for less than the entire area served by the incumbent.[59]

Nonetheless, the cable industry has contended that two provisions of the Communications Act require wireline competitors to cable systems to build out to match cable system incumbent service territories. First, cable companies have argued that Section 621(a)(3)[60] compels build-out requirements even if the Commission recognizes their anticompetitive effect and their detrimental effect on broadband deployment. Section 621(a)(3) is a prohibition on redlining, and it does not impose a build-out requirement over less-restrictive means of preventing such conduct.[61] Accordingly, the United States Court of Appeals for the District of Columbia ruled in *American Civil Liberties Union*,[62] that the statute "manifestly does not require universal service

[59] *See, e.g.*, *Southeast Florida Cable v. Martin County*, Case No. 94-14209-CIV-PAINE, 1995 U.S. Dist LEXIS 22413 (S.D. Fl. Oct. 24, 1995).

[60] 47 U.S.C. § 541(a)(3) ("[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.")

[61] *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1579-1580 (D.C. Cir. 1987). *See also Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F.Supp. 383, 400 (S.D. Fla. 1991).

[62] *ACLU v. FCC*, 823 F.2d at 1579-80.

… if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.[63]

Similarly, Section 621(a)(4)(A),[64] which forbids LFAs from mandating unreasonably short build-out periods, does not require build-out. In fact, the D.C. Circuit squarely rejected the argument that it does imply such a requirement, finding that § 621(a)(4)(A) "does not . . . require" that cable operators extend service "throughout the franchise area" – or, indeed, that cable operators do *anything* – but instead was a limit on franchising authorities that sought under state law to impose such obligations.[65] Therefore, this provision in no way constrains the Commission from recognizing that it is inherently unreasonable under Section 621(a) to require a competitive entrant to commit to build-out requirements as a condition of entry.

3. The "Reasonable Time Period" for Entrants to Build Out Is Dictated By Market Conditions and the Entrant's Competitive Success

Although the National Cable Telecommunications Association attempts to invoke equity by arguing that build-out requirements are necessary to ensure that competition is not "artificially skewed by rules and regulations that unfairly give some competitors an unfair advantage over others,"[66] the reality is that build-out requirements, and not their absence, will artificially skew competition in broadband markets. Logically, NCTA's argument that cable

[63] *Id*. at 1581.

[64] 47 U.S.C. § 541(a)(4)(A) ("[i]n awarding a franchise or franchises, a franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.").

[65] *Americable Intern., Inc.* v. *Department of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[66] National Cable Telecommunications Association Comments, at 17, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (Sep. 19, 2005)..

franchise build-out requirements should apply to competitors,[67] means that every potential broadband service provider other than a franchised cable operator must comply with many different, and often competing, regulatory demands for investment and upgrades, including network extensions outside its current service area, if it wishes to offer the full suite of broadband services over its existing network. Cable operators, on the other hand, are free to offer the full suite of broadband services anywhere they choose without complying with any regulatory demands for investment and upgrades, much less any network extensions. Indeed, cable operators cannot be subjected to build-out requirements requiring them to provide telephone service throughout a LEC study area, or to all types of customers.[68]

NCTA's argument that our patchwork quilt of cable network footprints ought to be the roadmap defining future construction and upgrading of advanced telecommunications networks would be quickly recognized as an absurd proposition if it were made in any other sector of our economy. It strains the imagination to think that prospective competitors to WalMart, Home Depot, Safeway, or McDonald's would be required before opening their first store to commit to building many such stores covering entire cities or states just to gain the right to test their concept in the first location. Indeed, the Commission has concluded that facilities-based build-out requirements for CLECs operate as barriers to entry, which are proscribed by section 253 of the Act with respect to telecommunications services.[69] In preempting such requirements imposed by Texas, the Commission concluded that they are "prohibitively expensive" and

[67] *Id*., at 16-24.

[68] *In the Matter of The Public Utility Commission of Texas*, CCB Dkt. No. 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 13 (1997); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[69] 47 U.S.C. § 253.

"impact the threshold question of whether a potential competitor will enter the local exchange market at all."[70] While the Texas Commission argued that such build-out requirements were intended to preserve and advance universal service, safeguard consumer rights, and serve other public policies, the Commission noted that Congress "reached a different conclusion . . . since it did not impose any buildout obligations on carriers."[71]

Competitive markets rely on consumers to decide when and where competitors build out. Moreover, allowing markets rather than regulators to determine when and where competitors will provide service will actually result in more service being provided. In the face of a monopoly, a build-out requirement may make sense because monopolists have the incentive to restrict service. Accordingly, incumbent build-out or "universal service" requirements arose in an environment in which the provision of video service was thought to be a natural monopoly and multiple applicants were often vying for the right to be the *exclusive* provider of service in a particular franchise area. In this context, build-out conditions were justified as necessary to ensure that service was available at all, and in return for the commitment to serve the entire community, the initial franchisee had decades free from significant competition to recoup its build-out costs.

Even if build-out conditions may have had some merit when applied to the initial, often exclusive, cable franchises they have only negative effects on subsequent video entry and competition. In competitive markets, firms' incentives are diametrically opposed to those of exclusive franchisees; they seek to expand their service areas. Moreover, it is impossible to predict beforehand where an entrant's service will succeed and/or fail, much less at what rate it

[70] *Public Util. Comm'n of Texas*, 13 FCC Rcd 3460 ¶¶ 13, 78, 81, 95 (1997), *aff'd on review of other issues sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

[71] *Id.* ¶ 83.

will grow market share. Therefore, imposing build-out requirements on entrants increases their risk, and makes it less likely they can obtain financing and enter. Consequently, a substantial reduction in LEC and other competitive entry is the most likely result of build-out requirements, which is a result that would deny broadband and video customers the benefits of competition and ubiquitous deployment.[72]

Build-out requirements, increase the cost and risk of entry, particularly in network industries.[73] In particular, they increase the amount of investment to which an entrant must commit before offering service in the first place.[74] They are inconsistent, therefore, with the natural (indeed prudent) strategy usually employed by entrants in competitive markets of targeting, at first, just one part of the market served by the incumbent.[75] Cable operators are seeking to persuade franchising authorities, therefore, to deter entry by increasing the financial risk of subsequent entry and increasing the minimum scale of entry required, which is a classic

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[72] *See, e.g.*, G.S. Ford, T.M. Koutsky & L.J. Spiwak, *The Consumer Welfare Cost of Cable "Build-out" Rules*, Phoenix Center Public Policy Paper No. 22, (2005) (available at http://www.phoenix-center.org/pcpp/PCPP22Final.pdf) (*Phoenix Center Policy Paper #22*) (showing that *ex ante* "build-out" rules, when imposed on new entrants, deter entry significantly and force new entrants to bypass communities entirely) and citations therein.

[73] *See, e.g.*, T.W. Hazlett & G.S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the Level Playing Field in Cable TV Franchising Statutes*, 3 Business & Politics 21-46 (2001) (*Hazlett & Ford*). *See also Phoenix Center Public Policy Paper #22*; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844, 2919, App. B, ¶ 30 (2002).

[74] *See, e.g.*, *Merger of MCI Communications Corp. and British Telecommunications PLC*, 12 FCC Rcd. 15351, 15413, ¶ 162 (1997); Jean Tirole, *The Theory of Industrial Organization* 314-21 (1988).

[75] *See 1990 Cable Report* ¶ 139 ("incremental service . . . is often essential to the entry of a second competing cable system").

entry-deterring strategy.[76] In fact, such a strategy of requiring *greater* entry only makes sense because it deters entry (otherwise it would be inviting more competition than necessary). Therefore, it is not surprising that build-out conditions have not increased the number of households in a franchise area that enjoy competitive cable alternatives but, rather, have thwarted competition altogether.[77]

Fortunately, the Commission has a long history of removing build-out requirements, as mentioned above in connection with Section 253 of the Communications Act. Section 621 also contains a provision that clearly gives the Commission authority to remove build requirements, and it requires a franchise authority to afford a cable system "a reasonable period of time to become capable of providing cable service to all households in the franchise area."[78] This is not a novel provision in the Communications Act. To the contrary, "reasonableness" is routinely interpreted by the Commission[79] and, where possible, the Commission often chooses to rely on market-based competition to establish what is reasonable. For example, the Commission fulfills

[76] *See First Annual Video Competition Report*, 9 FCC Rcd 7442 (1994) at App. H ¶¶ 37-38; Thomas Krattenmaker and Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (Dec. 1986); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 3 (Spring 1971).

[77] Mark Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise—Some Established Systems Go To Great Lengths to Keep Rivals Out of the Game—A Nasty Battle in Niceville*, Wall St. J. (Sept. 24, 1992) at Al.

[78] 47 U.S.C. § 541(a)(4)(A).

[79] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 1 (1993) (setting rules to ensure reasonable rates for basic cable service tier); *Local Exchange Carriers' Rates, Terms, And Conditions For Expanded Interconnection Through Physical Collocation For Special Access And Switched Transport,* 12 FCC Rcd 18730, ¶ 2 (1997).

its statutory mandate to ensure that the rates of communications common carriers are "just and reasonable"[80] by relying on competition.

Therefore, USTelecom submits that the most natural interpretation of Section 621 in light of Commission precedent and the overall purposes of the Communications Act is to find that the Section 621 "reasonable period of time" limitation of LFAs' build-out requirements is to rely on market-based competition. In particular, competitive entrants may not be required to "become capable of providing service to all of the households in a franchise area" any more slowly or quickly than market conditions dictate. Competitive wireline video entry should not be dictated by, and limited to, the geographic contours of current franchised cable networks, as such constraints inevitably will delay and deter broadband deployment. Instead, new entrant network owners should be free to deploy broadband video wherever they have networks, and as business conditions dictate.

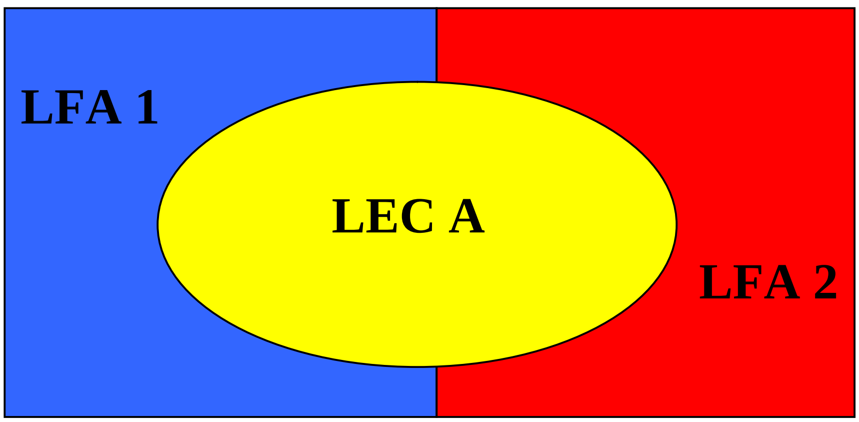
4. Build-Out Requirements Are Also Competitively Biased Because they Inherently Favor Cable Networks Over LEC Networks

Even if it made sense to require broadband entrants to serve entire areas, and it doesn't, there is even less reason that those areas should be defined by the contours of cable systems. There is very little congruence between LEC networks and cable networks (defined by their respective franchise areas, which were generally granted in return for market exclusivity). Cable system operators are seeking, however, to require video competitors to build-out entire cable franchise areas. Rather than encourage additional broadband deployment, this asymmetry could often prevent all providers other than the incumbent cable operator from achieving the triple

[80] 47 U.S.C. § 201(b).

play.[81] In fact, the real unfairness from a uniform build-out requirement would be that all competitors *but for the incumbent cable operator* would be required to expand their network into new areas just to offer their existing customers "triple play" service packages. Therefore, imposing cable franchise area build-out requirements on competitors seeking to offer broadband video in competition with the incumbent cable operator would create illogical, even perverse market outcomes.

The following diagram shows how build-out rules are particularly harmful where LEC and cable networks are not congruent.



LEC A is faced with the irrational (and often potentially uneconomic) choice of having to build new network in areas beyond its current footprint to serve all of LFA 1 just to add video to its existing network. Moreover, LEC A would face the same problem in LFA 2 if it wanted to offer video service to all of its customers on its existing network. The cable operators in LFA 1 and LFA 2, by contrast, can freely add voice (and any other service) to their existing networks without having to build new networks outside their current footprints. In other words, the cable

[81] This is so because the necessary investment (and high risks) from an upfront commitment to rapid network expansion and entry into additional telecommunications and data markets just to obtain the right to offer video to current subscribers could often outweigh the potential returns in the new markets, particularly where there already are additional wireline competitors beside the incumbent in the new markets.

companies are unaffected by the build-out requirement, and they likely offer additional broadband services (e.g., voice services) to existing subscribers. Conversely, LEC A is faced with the difficult choice of having to build new network extensions just to offer video services to its existing subscribers. Moreover, should it want to offer video services to all of its existing subscribers it has to build network extensions in *two* franchise areas. Therefore, LEC A faces greater costs, and more risk, in adding broadband services than does its competitors which, on average, reduces broadband service availability across its subscriber base. On the other hand, if there were no build-out requirements, LEC A would be more likely to add broadband video service offerings. Moreover, as its success grew in competition with one or both of the cable companies, LEC A would be more likely to extend its network to new areas, in competition with those cable companies.

In sum, a substantial reduction in LEC and other competitive entry is the most likely result of build-out requirements, which is a result that would deny broadband and video customers the benefits of competition and ubiquitous deployment.[82] This analysis is consistent with prior empirical findings regarding the negative effect of build-out requirements,[83] and with the Commission's choices in favor of market-based competition rather than regulatory build-out requirements in the telephony, broadband, wireless and satellite markets. With this experience in mind, the Commission should not make the mistake of imposing build-out requirements on broadband video services. Instead, the Commission should follow its own precedent and the example of most markets in our economy, by choosing to allow customers in the competitive marketplace to dictate when and where competitors add services to existing and new networks.

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[82] *See, e.g., Phoenix Center Policy Paper #22.*

[83] *See, e.g., Hazlett & Ford, passim.*

5. Broadband Competitors Have Strong Incentives Against "Redlining" In the Absence of Regulation

The cable industry often argues that LECs will discriminate against consumers on the basis of their income in the absence of build-out requirements.[84] This is facially illogical as LECs will be entrants into competitive markets. It is true that monopolists, which included most incumbent cable systems when they entered and deployed network, may have incentives to restrict output and avoid less profitable parts of franchise areas. This is not the case for entrants in competitive markets, however, which will serve every customer from which they can recover their costs. Not only do cable operators fail to provide any evidence that they *lose* money on entire sections of their service territories, but there is no reason to conclude that LECs would similarly lose money in those same places as LEC networks are already build out and provide service in those locations. In any event, there are clear reasons why build-out requirements are not only unnecessary to prevent "red-lining," but also result in less service to low-income consumers.

In the first instance, there are clear laws against redlining, which exposes entrants to potential liability should they engage in the conduct even in the absence of build-out requirements. Moreover, given that low-income households purchase video programming services at roughly the same rate as households at other income levels, [85] LECs have no incentive

[84] *See, e.g.*, Texas Cable TV Association, *Texas Cable Industry Announces Position on HB 3179*, Press Release (Apr. 12, 2005).

[85] *See, e.g.*, R. Kieschnick and B.D. McCullough, *Why Do People not Subscribe to Cable Television? A Review of the Evidence*, Unpublished Manuscript (1998) at 7-8 and App. A (available at www.tprc.org/ abstracts98/kieschnick.pdf (reviewing economic literature); *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 139 n.198 (1990) ("the nature of the broad-based demand for cable services should minimize the prospect that in the long term new entrants would find it profitable to only serve limited groups of homes within a metropolitan area").

to avoid offering video services over their existing networks in low-income areas. Indeed, LEC networks already serve low-income and high-cost areas—virtually every low-income and high-cost household in America can receive local and long distance telephone services over a LEC network. Finally, as incumbent cable operators begin to offer the full suite of communications and entertainment services throughout their service areas, LECs will face strong competitive pressure to deploy their video programming services as widely as economically feasible.

In any event, the operation of competitive markets is a far better deterrent to redlining than regulatory build-out mandates could ever be. Statements about limiting initial investment plans to "high-value" customers[86] are consistent with such competition, and they offer absolutely no logical basis to conclude that redlining will occur. Of course firms in competitive markets always go after the most profitable customers first, yet market competition leads them to serve all customers over time without regard to income.

Instead, build-out conditions, by deterring entry, are likely to produce a decrease in service to low-income and high-cost communities. Therefore, build-out requirements could not be held out as a reasonable "remedy" even if there were any basis here for redlining concerns. Build-out requirements would actually *create* new disincentives for LECs to offer video service in such areas by requiring the LECs to engage in capital-intensive network extensions outside their current service territories (in competition with other LECs) as a condition of providing video service in the low-income and high-cost areas where they already provide telecommunications and information services. The economically rationale response to such onerous build-out conditions is to bypass such a community entirely.[87] Thus, as the empirical

[86] *See* NPRM ¶ 6 & n.37.

[87] *Phoenix Center Policy Paper #22*.

data confirms, build-out conditions on competitive entry are likely to *reduce* the deployment of advanced broadband networks to low-income areas.[88]

B. It Is Unreasonable To Refuse A Franchise Simply Because the Terms and Conditions Are "More Favorable" Than Those Applied to the Incumbent.

Section 621 states that an LFA shall not "unreasonably refuse to award a competitive franchise."[89] Not only does this provision establish a clear preference for competition, but it also bounds LFA discretion in imposing terms and conditions on entrants. In particular, the LFA must act reasonably when asked for a competitive franchise. Given that entrants do not pose the kinds of risks to consumers that LFAs feared with cable incumbents, there is no good reason to apply the same restrictive regulations to entrants. In fact, not only is it not reasonable to require competitors to comply with incumbent-oriented regulations, as the Commission has repeatedly concluded, it is *unreasonable* to refuse to award competitive franchises unless competitors meet the terms and conditions imposed on incumbents.

The Commission has a long tradition of refusing to apply incumbent regulation on new entrants because it would harm the development of competition and such entrants do not threaten to "impose the kinds of harms much of existing regulation was intended to prevent."[90] The Commission has long recognized that different regulatory requirements for different classes of carriers are appropriate where "reasonable" obligations vary based on the unique circumstances of the carrier classes. Accordingly, the Commission has refused to impose carrier of last resort

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[88] Ford, Koutsky and Spiwak, *The Impact of Video Regulation on the Construction of Broadband Networks to Low-Income Households*, Phoenix Center Policy Paper No. 23 (Sept. 2005).

[89] 47 U.S.C. § 541(a)(1).

[90] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22,745, 22,750 ¶ 9 (2001).

and other incumbent obligations on new entrants. Indeed, the Commission has routinely adopted rules that impose different obligations on different classes of carriers.[91] This policy preference is reflected in the Communications Act itself, notably to protect cable operators from having to obtain a cable franchise to offer telecommunications services.[92]

Within the past year, this Commission determined that broadband service providers should not be subject to burdensome legacy regulation because doing so would harm deployment:

> First, this Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations. Those regulations were created over the past three decades under technological and market conditions that differed greatly from those of today.[93]

This decision is consistent with the longstanding Commission practice of removing unnecessary administrative burdens to "promot[e] competitive market conditions, facilitat[e] provision of new service offerings, and promot[e] market entry."[94] Notably, and with foresight, the Commission exempted information service providers from common carrier regulation,[95] and reduced

[91] *See, e.g.*, *Policies and Rules for Competitive Common Carriers*, First Report and Order, 85 FCC 2d. 1, ¶ 53 (1980) (the "application of different regulatory rules by class of carrier comes well within our broad discretion and authority under the Act"); *DBS Public Interest Order*, 13 FCC Rcd. 23254, ¶ 41 (1990).

[92] 47 U.S.C. § 541(a)(3)(A)(i).

[93] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 1 (2005).

[94] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16,857, 16,886 ¶ 59 (1998).

[95] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 431-32 ¶ 123 (1980) ("*Computer II*").

regulatory burdens on commercial mobile service providers.[96] Both ISPs and CMRS carriers now operate in vibrantly competitive markets, in significant measure due to those Commission decisions, and the Commission should seek to achieve similar results for broadband markets, as mandated by Section 706.

Throughout recent decades, the Commission has routinely found that imposing the same regulatory burdens on entrants and incumbents alike does not serve the public interest but, rather, harms it by thwarting competitive entry. For example, the Commission eliminated the Section 214 certification requirement for wireless carriers in order to promote PCS entry, finding that such requirements "can actually deter entry of innovation and useful service, or can be used by competitors to delay or block the introduction of service."[97] The Commission should do the same here, and determine that it is often (and, quite possibly always) reasonable to remove regulatory restrictions on entrants, and that it is unreasonable to deny a franchise application simply because it does not include comparable or "no more favorable" terms than those afforded the incumbent.

It does not make sense to impose on new video entrants the same regulatory requirements designed for incumbent cable operators because the two groups of firms are not similarly situated. Incumbent cable operators were "first movers" and enjoyed many years of freedom from competition (and for many years without rate regulation either). Now that they are entrenched in the market, they are far better capable of recouping the costs of build-out obligations and other costly franchise conditions than are later video entrants. By contrast, new

[96] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1417 ¶ 14, 1418-1419 ¶ 60 (1994) ("*Second CMRS Order*"); *see generally* 47 U.S.C. § 332(c).

[97] *See Second CMRS Order* at 1478, 1481 ¶¶ 173, 182.

entrants face from the outset the likelihood of sharing a market with two, three or more existing competitors. In these circumstances, the "prior existence" of the incumbent "makes the entry process *intrinsically asymmetric*, and this asymmetry exists even if the entry costs borne by the entrant and incumbent are identical."[98] "Labeling nominally symmetric obligations borne by entrants and incumbents as 'equal' burdens ignores the greater likelihood that the residual profits anticipated by the entrant will be insufficient to cover fixed costs, relative to the incumbent that entered without rivals."[99]

Although cable operators currently oppose treating video entrants like other communications service provider entrants, rather than like incumbent cable operators, the cable industry itself has consistently taken the opposite position.[100] In fact, NCTA itself has even recognized that "in the video context, economic regulation of newcomers is unnecessary,"[101] a position that compels the conclusion that it is unreasonable to deny a franchise application simply because it is not comparably burdensome with the incumbent's franchise. The Commission should heed that call and recognize that the local franchising process itself is a form of economic regulation that, when applied to new telecommunications carrier entrants into the video marketplace, acts as a significant barrier to entry and deters infrastructure investment.

The law recognizes that, in circumstances like these, imposing the same regulatory mandates on such differently-situated parties is, in fact, unreasonable and unnecessary to accomplish statutory objectives. In fact, the Commission has never endorsed "regulatory parity"

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[98] *Hazlett & Ford, supra* n.71, at 24 (emphasis in original).

[99] *Id*.

[100] *See, e.g.*, Reply Comments of NCTA, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GEN Docket 00-185, filed Jan. 10, 2001, at 36.

[101] National Cable & Telecommunications Association ("NCTA"), *Working Toward a Deregulated Video Marketplace*, June 2005, at 4, at 2 (available at http://www.ncta.com).

as the cable industry defines it – precisely mirrored obligations on all providers without regard to relevant differences. To the contrary, the Commission has always properly recognized that "legal, market, or technological distinctions may *require* different regulatory requirements."[102] Nothing in the Cable Act suggests that the case should be different for cable operators; there is no record of any congressional intent to impose identical conditions on all operators in a franchise area, as one might expect in support of a "level playing field" provision. To the contrary, the entrants and incumbents are routinely treated differently.[103] Precisely because new entrants often are *not* similarly situated with incumbent providers, the Commission, Congress and the courts have repeatedly rejected pleas for universal service or build-out conditions on entry in particular contexts where, as here, those conditions will deter entry and harm competition and consumers.[104]

C. The Commission Should Require Franchise Approval as a Matter of Course for LEC Use of Facilities that are Covered by Pre-Existing Access to Rights of Way.

The Commission has sought to ensure on many occasions that the burdens of incumbent-oriented regulation are not imposed unnecessarily on entrants. One notable set of examples concerns the licensing process for competitors in local exchange and long distance telecommunications markets. Competitive LECs (CLECs) are able to obtain state-wide licenses with a minimum of time and effort. Similarly, the Commission has modified the requirements for competitors seeking authorization to provide interstate telecommunications service, pursuant

[102] *Wireline Broadband NPRM* ¶ 7.

[103] *See, e.g.*, § 623(a)(1) (rate regulation); § 653(c)(1)(C).

[104] *See, e.g.*, *Texas Preemption Order*; *LyncStar Integrated Communications, LLC*, 13 FCC Rcd. 24280, 24823 n. 20 (1998) (citing *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd. 18223, 18330, 18332 (1996)).

to Section 214.[105] Rather than endure the time and expense of the traditional Section 214 applications process, competitors are licensed pursuant to a "blanket" authorization. The Commission should follow these precedents and similarly minimize the time and expense involved in obtaining a competitive cable franchise, by making authorization a matter of course in the usual case, with short time periods for LFA review. This is particularly true for LEC entrants, as they typically have authorization to use public rights of way *before* applying for a cable franchise, which removes the primary justification for cable franchise regulation.

Franchise regulation of cable operators is based on municipalities' need to manage the use of public rights of way, and the legislative history of the federal franchise provision confirms that "[t]he premise for the exercise of . . . local jurisdiction over cable systems continues to be [the] use of local streets and rights of way."[106] The Commission and the courts have regularly concluded that franchise authorities' jurisdiction arises only where a service uses the public rights of way.[107] For example, the Commission stated in deciding that "video dialtone" services offered by telephone companies should not be subject to cable franchise regulations that Section 621 is primarily concerned with the use of public streets and rights-of-way by cable television operations.[108]

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[105] 47 U.S.C. § 214(a-e).

[106] S. Rep. No. 97-518, at 5 (1982).

[107] *See, e.g., Motion for Declaratory Ruling, Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14277, 14301, 14307-08 ¶¶ 52, 62 (1998); *Cable Modem Order* at 4750 ¶ 104; *National Cable Television Ass'n v. FCC,* 33 F.3d 66, 73 (D.C. Cir. 1994); *Century Federal Inc. v. City of Palo Alto,* 648 F. Supp. 1465, 1477-78 (N.D. Cal. 1986); *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 656-57 (N.D. Ohio 1968) (city had no authority to impose franchise where operator "is not stringing wires or digging ditches or erecting poles so that the general problems which these activities present to the local residents are not present").

[108] *Telephone Company-Cable Television, Cross-Ownership Rules, Sections 63.54-63.58*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, 5072 ¶ 11 (1992), *aff'd*,

Although telecommunications carrier video entrants will use local rights of way, cable franchise requirements are entirely unnecessary to regulate telecommunications carrier video entrants' use of the public rights of way. As the New York Public Service Commission has acknowledged,[109] municipalities (and state governments) *already* closely oversee LECs' use of local rights of way for the provision of telecommunications and information services. Telecommunications carriers are subject to the equivalent of a "franchise" through a host of permitting requirements and rules that dictate how, when, and where they can deploy facilities in the public rights of way and that are designed to protect public safety and welfare.[110] Therefore, as the Commission already has explicitly recognized, there is no legitimate basis for imposing a redundant layer of franchise obligations on telecommunications carriers' video services in light of their preexisting use of (and authority to use) the rights of way.

Duplicative and unnecessary franchising requirements harm consumers by deterring and delaying the entry of new video providers that can offer advanced broadband and video services, and therefore the Commission should adopt a streamlined application process for such new entrants. The Commission clearly has authority to do so. As discussed above, it is the Commission that has primary jurisdiction to determine what constitutes the "unreasonable

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National Cable Television Ass'n, 33 F.3d at 73; *see also City of Chicago v. FCC,* 199 F.3d at 433.

[109] *Joint Petition of the Town of Babylon, et al.*, Declaratory Ruling on Verizon Communications, Inc.'s Build-out of Its Fiber to the Premises Network, Cases 05-M-0250, 05-M-0247, at 20-21, 26-27, 2005 N.Y. PUC LEXIS 253, *5 (N.Y. Pub. Serv. Comm'n June 15, 2005).

[110] *See, e.g.*, Ark. Code Ann. § 14-200-101(a)(1)(A) (2004); City of Upper Arlington, Ohio Streets and Services Code, § 933.03(B) (2004); Kan. Stat. Ann. § 17-1902(d) (2004); Ohio Rev. Code Ann. § 4939.03(C)(1) (2004); Mich. Comp. Laws § 484.3115; Ind. Code. Ann. § 8-1-2-101(a).

refusal" of a franchise by an LFA[111] and, correspondingly, to define what constitute "reasonable" franchise requirements. Accordingly, the Commission can and should establish standards that limit the need for duplicative and unnecessary franchise obligations.

A streamlined franchise applications process would be fully consistent with Commission precedent and its application of similar Communications Act requirements in other markets. In fact, the Commission noted in the *Cable Modem Order*, that "a local franchising authority [should not be free] to impose an additional franchise" on a provider that is already — and would continue to be — subject to one set of franchising obligations as a result of its use of those rights of way.[112] The cable incumbents themselves have agreed, arguing against duplicative local rights-of-way regulations of their own facilities, stating that local rights-of-way ordinances would "make[] no sense when . . . new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, *without imposing any additional burden on rights-of-way*."[113] Indeed, cable operators generally have not been subject to multiple franchise requirements when they deploy new services beyond those within the scope of their original cable franchises. The same should be true for LECs, and "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications

[111] NPRM ¶ 19.

[112] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4850 ¶ 102 (2002) ("*Cable Modem Order*"), *aff'd, National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, __ U.S. ____, 125 S. Ct. 2688 (2005).

[113] Comments of NCTA, *IP-Enabled Services*, WC Docket 04-36, May 28, 2004, at 21 (emphasis added); *see also* Reply Comments of Comcast Corporation, *Internet Over Cable Declaratory Ruling*, CS Docket 02-52, Aug. 6, 2002, at 23.

providers to upgrade or build new facilities to provide a broad array of new communications services."[114]

LFA desires to collect franchise fees, preserve channel capacity for PEG programming, and ensure appropriate emergency alert capabilities similarly fail to offer any foundation for applying burdensome franchise application processes to the entry of telephone carriers into video programming distribution. These objectives can be served just as well without the elaborate and burdensome franchise review processes historically imposed by most local franchise authorities. It merely requires that existing network owners agree to pay lawful fees, preserve access to channel capacity for PEG programming and ensure appropriate emergency alert capabilities.

For these reasons, the Commission should follow through on its suggestion to "impos[e] … greater restrictions on the authority of LFAs with respect to those entities … that already have permission to access public rights of way."[115] In particular, the Commission has ample authority to adopt, and it should adopt, streamlined licensing processes for telephone companies and others that already operate franchised physical networks within the municipal jurisdiction.[116] Such a streamlined process would be consistent with the Commission's treatment of competitive entrant licensing in other markets, such as the relaxed requirement for competitive telecommunications service providers to obtain permission to construct facilities pursuant to Section 214.

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[114] *Cable Modem Order* at 4850 ¶ 104 (quoting *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21,396, 21,429 ¶ 78 (1997)); *cf. id.* at 4849-50 ¶ 102 ("Once a cable operator has obtained a franchise . . . our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service.").

[115] NPRM ¶ 22.

[116] *Cf. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd. 6828, Appendix B (1993).

D. The Commission Should Establish Minimum Time Periods and Procedural Limits on Franchise Application Review.

Just as the Commission should streamline the process for cable systems competitors that already have access to public rights of way, so too should the Commission minimize the time and expense involved in the franchise applications process for all competitive applicants. The Commission asks "how we should define what constitutes an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1)." In particular, the Commission requests comments on its tentative conclusion:

> Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute a de facto "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).

This analysis is clearly correct, and the Commission should act on it to adopt rules defining when the failure to rule on an application constitutes an unreasonable denial, and when granting an application with unreasonable conditions constitutes an unreasonable denial. The courts have expressly recognized that imposing an unreasonable condition on the grant of a license application may be deemed an effective denial of that license for purposes of § 402(b) of the Act.[117]

Congress clearly intended for the provisions of Section 621(a) to place meaningful limits on the actions of LFAs in order to encourage competition among video service providers.[118] One

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[117] *See Tribune Co.* v. *FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998) (*citing Mobile Communications Corp. of America* v. *FCC*, 77 F.3d 1399 (D.C. Cir. 1996)).

[118] *Cable Television Consumer Protection and Competition Act of 1992*, H. Rep. No. 102-862, at 77 (1992); *Cable Television and Consumer Protection and Competition Act of 1992*, H.

of the biggest, inherent problems with the current franchise requirements is that the process simply takes too long.[119] The process – including application, review, negotiation, and approvals – routinely takes many months, and often more than a year.[120] Both Section 621(a) and Section 626 reflect concerns with preventing delay in franchising decisions. Congress' very choice of words – "unreasonably refuse to award" – reflects an intent to ensure that the franchising process moves forward at a reasonable pace. Notably, by its express terms, this provision is not limited to cases where an LFA outright denials an application. Instead, the requirement also applies when a franchising authority unreasonably fails to grant a competitive franchise, as it might do through simple inaction or delay. One of the key concerns underlying the provision is that franchising authorities could simply string out the process and deter entry by not acting in a reasonable period of time on a franchise application. So the provision applies fully when a franchising authority unreasonably withholds action, or simply fails to act within a reasonable period of time.

Finally, the entire application process cannot be forced upon entrants with access to rights of way—such as LECs—until they are ready to offer video programming. Some municipalities have sought to impose franchise obligations well before their authority was invoked, asserted

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Rep. No. 102-628, at 46 (1992); *Cable Television Consumer Protection Act of 1991*, S. Rep. No. 102-92, at 91 (1991).

[119] *See* BellSouth Comments at 3-4, 11-12, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (Sep. 19, 2005) (twenty video franchises obtained by September 2005 required nearly one year on average to negotiate, and some took three years); Qwest Comments at 12-14 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (Sep. 19, 2005) (three years to renegotiate seven franchises in Phoenix and obtain eight new agreements in Phoenix, Denver and Salt Lake City); Verizon Comments at 8-9 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 05-255 (Sep. 19, 2005) ("The *process*—including application, review, negotiation and approvals—routinely takes many months, and often more than a year").

[120] *Id.*

that existing telephone carriers need a local video franchise not only to provide IP-enabled video programming, but even to upgrade existing telephone networks with the fiber, electronics and other physical components needed to provide IP and broadband service. These attempts to expand the reach of local franchising authority are clearly impermissible, as the New York Public Service Commission held last year.[121] The Act requires a local video franchise only before a "cable operator" "provide[s] cable service."[122] Accordingly, LFAs have no authority to bar existing telephone carriers from installing fiber, upgraded electronics or other assets in their existing telephone rights-of-way, or from taking any other action short of providing cable service.[123]

E. The Commission Should Prevent LFAs From Requiring In-Kind Services Above and Beyond the Statutory Maximum 5% Franchise Fee.

The Commission should also take this opportunity to address another significant problem facing cable system competitors. Unfortunately, the franchising process is rife with demands for cash and free or discounted services and equipment over and above franchise fees. These demands can effectively tax new entrants to death, and have the very effect that Congress acted to prevent: deterring entry and competition.[124] It is critical that the Commission promulgate rules to curb this rent-seeking behavior.[125]

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[121] *Joint Petition of the Town of Babylon, et al.*, 2005 N.Y. PUC LEXIS 253, *5 (June 15, 2005).

[122] 47 U.S.C. § 541(b)(1).

[123] *New Ulm Telecom*, 10 FCC Rcd 2705, ¶ 8 (1995; *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶ 61 (1998); *TCI Cablevision of Oakland County Inc.*, 13 FCC Rcd. 16400, ¶ 2 (1998).

[124] An empirical study showed that approximately 26% of the capital costs incurred by cable operators, and 11% of operating expenses, were attributable to in-kind contributions to local franchise authorities, with little or no benefit to consumers. Mark A. Zupan, The Efficacy of

In its Comments on the 2005 Video Competition NOI, Verizon reported that it frequently has received demands by LFAs that are completely unrelated to its proposed video operations. The examples are illustrative, and worth repeating here:

> Verizon frequently has received demands by LFAs that are completely unrelated to its proposed video operations. For example, one county has demanded that Verizon connect all of the traffic signals in the county with fiber. In that vein, another LFA wants Verizon to fund the municipality's purchase of street lights from the local power company. That same LFA also proposed that Verizon allow parking for the town library at a Verizon facility, build a mobile telephone repeater at city hall, and provide city employees with mobile telephone service. Yet another LFA is demanding that Verizon provide the county with free use of Verizon conduit and manholes as well as free attachments to all Verizon utility poles. Other frequent demands by LFAs include connecting all city or county buildings with fiber and providing the local government with free data services – sometimes wired, sometimes wireless, sometimes both. One LFA, for example, would like Verizon to construct an additional I-Net for the county, at a cost of over $4.9 million. Similarly, one LFA demanded that Verizon provide 6 fiber-strand I-Nets to 120 municipality sites (or pay the cash equivalent). Likewise, some LFAs even demand that fiber be provided to other private individuals or organizations. For example, one county seeks to require that Verizon provide fiber to 60 "human services" organizations that work with the county.
>
> Other demands, while perhaps arguably related to video services, still far exceed what should reasonably be expected of a new entrant in the market. For example, one county seeks to require Verizon to carry 18 or more Public, Educational and Government ("PEG") channels in the franchise area – approximately 6 times the average. Another LFA has requested that Verizon provide free video services to all houses of worship within the municipality.

Franchise Bidding Schemes in the Case of Cable Television: Some Systematic Evidence, 32 J. Law & Econ. 401, 405 (Oct. 1989).

[125] Even cable operators have argued, in the context of their own franchise renewal applications, that the amounts contributed by operators to support construction of an institutional network must be treated as part of the franchise fee payment. *See Comcast of California II, LLC v. City of San Jose*, No. 5:03-cv-02532-RS (N.D. Cal. 2004) (complaint dismissed for lack of ripeness), appeal pending *Comcast of California II, LLC v. City of San Jose*, No. 04-16968 (9th Cir. filed Oct. 6 2004).

> Many LFAs also want money from the new video provider. Examples include an "application filing fee" in excess of $50,000, a "franchise acceptance fee" in excess of $250,000, and an up-front "PEG support" grant in excess of $250,000. One LFA demanded that Verizon post a $20 million performance bond and provide a $500,000 letter of credit guaranteeing satisfaction of performance standards. Many LFAs also request that Verizon fully indemnify them for lawsuits brought by the cable incumbents, thus making Verizon foot the bill for fighting off the anticompetitive tactics of some cable companies.[126]

Verizon is not the only LEC to face these kinds of demands. Instead, all entrants face such demands as they are endemic to the cable franchise process as it is currently operated.

Requests for fees and services above and beyond statutorily-authorized franchise fees are illegal. Section 622(b) of the Cable Act provides that franchise fees imposed on an operator "shall not exceed five percent of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services."[127] Section 622(g) defines "franchise fees" to include "*any* tax, fee, or assessment *of any kind* imposed by a franchising authority or other governmental entity" on an operator, and further makes specifically clear that "payments which are required by the franchise to be made by the cable operator . . . for, or in support of the use of, public, educational or governmental access facilities" must be included in assessing compliance with the statutory fee cap.[128] There are several, specifically enumerated exceptions to the franchise fee definition, namely, "taxes and fees," "capital costs" for "public, educational, or governmental access facilities," and "incidental" charges like "bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages."[129] The Commission should

[126] Comments of Verizon, at 12-13, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (Sep. 19, 2005).

[127] 47 U.S.C. § 542(b).

[128] *Id.* §§ 542(g)(1) & (2)(B) (emphasis added).

[129] *Id.* § 542(g)(2).

hold that any obligation or in-kind requirement that is not contained within those explicit exceptions should count toward the statutory franchise fee cap.

Rather than require video entrants to litigate the propriety of individual fees and requests through legal challenges and costly court remedies every time an LFA exceeds the statutory 5% cap, therefore, the Commission should promulgate a rule limiting the demands on franchise applicants to the statutory maximum. In particular, the Commission should expressly provide that *any* obligation to make payments, or provide *anything* of value (other than items expressly excluded from the "franchise fee" definition), to an LFA or its designee constitutes the payment of a franchise fee. Therefore, such an obligation must be credited at full market value toward the provider's franchise fee payment.

III. THE COMMISSION SHOULD PREEMPT INCONSISTENT STATE AND LOCAL ACTION, INCLUDING ALL "LEVEL PLAYING FIELD" STATUTES, WHICH SUBSTITUTE STATE JUDGMENTS FOR FEDERAL STANDARDS OF REASONABLE FRANCHISE APPLICATIONS.

The Commission should make clear that the rules it establishes to implement Section 621(a) and other provisions of the Act squarely preempt *any* inconsistent state and local statutes, regulations, rules, and practices. In particular, the Commission's determinations of the meaning of Section 621(a) bind LFAs and reviewing courts, and any contrary requirements contained in "level playing field" laws or existing franchises will be preempted and can be given no force by the LFAs or by reviewing courts. The Commission asks in the NPRM about preempting level playing field statutes:

> In some cases it may be the state itself, rather than the LFA, that has taken steps which unreasonably interfere with new entrants' ability to obtain a competitive franchise. We ask commenters to address whether it may be appropriate for us to preempt such state-

> level legislation to the extent that we find it serves as an unreasonable barrier to the grant of competitive franchises.[130]

USTelecom submits that the Commission can and, indeed, must conclude that "level playing field" statutes are inherently suspect. Accordingly, the Commission should take this opportunity to preempt such laws.

So-called level playing field statutes are state laws that generally require LFAs to only grant franchises to cable competitors that are "no more favorable" or "no less burdensome" in their terms than the franchises held by incumbent cable operators. A number of states have these statutes which inhibit competitive video entry by imposing on entrants a host of requirements to which only a monopolist could agree.[131] Similar provisions appear in some incumbents' franchise agreements. Incumbent cable providers use these laws to pressure LFAs (under threat of litigation) to require the new entrant to build-out and serve an entire franchise area on an expedited basis or to match all of the concessions previously provided by the incumbent in order for it to gain its original monopoly position in the local area, despite the vastly different competitive situation facing the new entrant. Moreover, these statutes provide a basis for endless litigation by incumbent cable operators seeking to forestall competition.

The supposedly equal burdens required under level playing field statutes laws actually impose heavier burdens on new entrants than on incumbents, which creates barriers to entry. Incumbents generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, and often decades. In contrast, competitive video providers who

[130] NPRM ¶ 14.

[131] The Commission noted the existence of these statutes when it initiated this proceeding. NPRM ¶ 14. *See also Hazlett & Ford, supra* n.71. Some examples include: Cal. Gov't Code § 53066.3(D); Conn. Gen. Stat. § 16-331(g); Fla. Stat. § 166.046(3); 65 ILCS § 5/11-42-11(e); Minn. Stat. § 238.08(1)(b); N.H. Rev. Stat. Ann. § 53-C:3-b; 11 Okl. Stat. § 22--107.1; Tenn. Code §§ 7-59-201-7-59-207.

enter the market today are in a fundamentally different situation, facing ubiquitous competition from strong and entrenched competitors. Entrants must reasonably anticipate smaller market shares, and likely lower profit margins, than expected (and nearly always realized) by the incumbent cable operator, which faced no rivals for many years.[132] In other words, forcing a new entrant into the video business to incur—as a prerequisite to entry into a competitive market—the kinds of costs that the incumbent was able to recover over the years when it enjoyed a monopoly franchise acts as a barrier to entry.[133] The extent to which these statute are not really aimed at "fairness" but, rather, at protecting incumbent cable operators from competition was demonstrated when a cable trade publication heralded the introduction of one such statute with the headline: "California Anti-Competition Bill Pending."[134]

In contrast, the Commission and the states have never required cable companies and other telecommunications services competitors to match all of the obligations imposed on the incumbent LECs (ILECs). For example, ILECs are generally required to provide telecommunications services throughout their service areas, and are subject to carrier of last resort obligations. Competitive telephone providers—including all the major incumbent cable companies—on the other hand, are generally permitted to provide service where and to whom they choose within each state, after making the minimal showing required to become certified as a competitive provider.

[132] *Hazlett & Ford*, *supra* n.71.

[133] *Phoenix Center Paper #21*, at 39 (July 2005) (noting that the costs that the incumbent had to incur to enter the market "are sunk and essentially irrelevant to that firm's subsequent business decisions," while for a prospective new entrant, "sunk costs are a *marginal* cost and before spending them, the prospective entrant will consider other uses for those funds").

[134] *California Anti-Competition Bill Pending*, Cable TV Franchising, Aug. 31, 1998, at 2.

In light of these facts, it is clear that "level playing field" statutes necessarily must be deemed overly broad to accomplish whatever purpose a legislature may have had in adopting them. State level playing field statutes intrinsically limit LFAs' ability to award franchises, substituting state judgments for those established in the Communications Act. In particular, level playing field statutes generally preclude the possibility that more favorable franchise terms may be reasonable, which directly conflicts with the Section 621(a) requirement that an LFA not unreasonably deny a competitive franchise. The conflict arises because the statutes require LFAs applying federal law to substitute state legislative pronouncements about franchise burdens for federal standards of reasonableness. Moreover, level playing field statutes may also violate the First Amendment.[135] A content-neutral restriction on video programming distribution will be upheld only if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[136] Such state usurpation of federal authority and Constitutional guarantees cannot stand.

The Commission has the authority to preempt inconsistent local franchise authority and state actions. Given the Commission's authority to interpret the provisions of the Act, the NPRM rightly concluded that the Commission has authority to preempt local franchising authorities' actions that are at odds with its tentative conclusion, in this case to preempt laws and order that cause an unreasonable refusal to grant a franchise.[137] The source for federal preemption is found Supremacy Clause of the Constitution of the United States of America, which state that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every

[135] *See Time Warner Enter. Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001).

[136] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

[137] *NPRM* ¶ 15.

State shall be bound thereby . . . ."[138] Accordingly, where state or local laws conflict with valid federal regulations, they are subject to preemption (so called "conflict preemption).[139] As the Supreme Court has explained, the only "inquiry [is] whether the federal agency has properly exercised its own delegated authority."[140]

"Conflict preemption exists where state law actually conflicts with federal law, making it impossible to comply with both, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[141] In particular, an agency can preempt any state law that touches on a subject matter over which Congress has delegated to that agency regulatory authority.[142] Conflict preemption applies with equal force to federal regulations.[143] For this reason, "[w]henever state regulation would frustrate achievement of a federal regulatory objective, FCC jurisdiction is paramount and conflicting state enactments must yield."[144]

The Commission plainly has the authority, indeed the responsibility, to ensure that Section 621 is faithfully implemented. Even before the Communications Act was amended by

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[138] U.S. Const. art. VI §2; *see also McCulloch v Marylan*d, 17 U.S. 316 (1819).

[139] *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1984) ("[f]ederal regulations have no less preemptive effect than federal statutes").

[140] *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

[141] *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768 (11th Cir. 1998) (citations and quotations omitted); *see also Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

[142] *See City of New York*, 486 U.S. at 63-64.

[143] *See Id.*, 486 U.S. at 63; *Louisiana Public Service Comm'n*, 476 U.S. at 368-369; *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less preemptive effect than federal statutes.").

[144] *State Corp. Comm'n of State of Kan. v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986); *see also North Carolina Utils. Comm'n v. FCC*, 552 F.2d at 1036, 1046 (4th Cir. 1977).

the 1984 Cable Act, the Supreme Court specifically upheld the Commission's authority to preempt local franchising requirements that could frustrate the introduction and expansion of cable systems.[145] This authority was bolstered by the 1984 Cable Act, which amended the Communications Act so that "any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with [the Cable Act] shall be deemed to be preempted and superseded."[146] This provision has been interpreted by the courts as evidence of "unmistakable" statutory intent to preempt state and local franchising decisions that are inconsistent with Section 621.[147]

A federal-local conflict can arise where the Commission chooses *not* to regulate, just as it can where the Commission and locality adopt inconsistent rules. For example, the Commission established a "vacuum of deregulation" by discontinuing regulation of CPE [Customer Premises Equipment] under Title II of the Communications Act and substituting a new set of rules based on competition and market forces.[148] The D.C. Circuit concluded that the new rules nullified state laws notwithstanding the fact that the restrictions were *less* burdensome than the ones the states sought to impose. The Commission's "policy favoring regulation by market forces" over command-and-control governmental oversight "is neither arbitrary, capricious, nor an abuse of

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[145] *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

[146] 47 U.S.C. § 556(c).

[147] *Liberty Cablevision of Puerto Rico* v. *Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005).

[148] *Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-15 (D.C. Cir. 1982)

discretion," and therefore validly preempted state law.[149] In the end, "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way."[150]

Level playing field statutes, comparable regulations, and provisions in franchise agreements may seem, at first blush, to be well intentioned and competitively neutral. As discussed above, however, they are anything but competitively neutral. More importantly, they directly conflict with and frustrate federal law on their face. The Commission should reassert federal primacy, as directed by Congress, by establishing that LFAs must consider all reasonable applications, even ones that run afoul of level playing field statutes. District court decisions upholding level playing field statutes are not inconsistent because, at the time, the Commission had not interpreted an "unreasonable" denial under Section 621.[151]

[149] *Id.; see also New York State Comm'n*, 749 F.2d at 811 (emphasizing that, "beyond question," the FCC may "allow the marketplace to substitute for direct Commission regulation").

[150] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1993) (citing U.S. Const., Art. VI, cl. 2).

[151] *Cable TV Fund 14-A, Ltd.* v. *Naperville*, 1997 U.S. Dist. LEXIS 7336 (citing cases); *Cable Systems of S. Conn., Ltd.* v. *Conn. DPU*, 1996 WL 661818, *3 (Conn. Super. Ct. Nov. 4, 1996).

IV. CONCLUSION

The Commission should take and, indeed, must take action consistent with Section 706 of the Telecommunications Act of 1996, to implement Section 621 in such a way as to remove barriers to entry for broadband entrants who plan to bring much needed video choice to consumers and, thereby, accelerate and expand their broadband deployments. In particular, the Commission should: (1) Eliminate build-out requirements for entrants, relying instead on market competition; (2) Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent; (3) Require franchise approval as a matter of course for LEC use of facilities that are covered by pre-existing access to rights of way; (4) Establish minimum time periods and procedural limits on franchise application review; and (5) Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee.

Finally, the Commission should ensure that its decisions and rules are given effect by preempting inconsistent state and local action, particularly so-called level playing field statutes.

Respectfully submitted,

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February 13, 2006